In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-859

HAZELWOOD CHRONIC & CONVALESCENT HOSPITAL, INC., dba KEARNEY STREET CONVALESCENT CENTER,

Petitioner,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, THE UNITED STATES OF AMERICA, and BLUE CROSS OF OREGON, dba NORTHWEST HOSPITAL SERVICE,

Respondents.

PETITIONER'S REPLY BRIEF

TOOZE KERR PETERSON MARSHALL
& SHENKER
ARDEN E. SHENKER
MICHAEL J. GENTRY
801 Standard Plaza
Portland, Oregon 97204
Counsel for Petitioners

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-77

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NEW ARGUMENTS STATED

1. *The "question presented."* Respondents' statement of the question (Resp. 1) predicts their insertion of new issues and non-issues. The issues were framed in the Petition (Pet. 2-3); they are of statutory construction and constitutional authority. Of course, "excess depreciation" given by Medicare may, by regulation, be taken back by Medicare. But what is "excess"? How may that be determined? What authority allows the respondents to act without that de-

termination? And what limitation is there on such action, aside from caprice?

2. *Findings.* The respondents first imply (Resp. 3-4) that the Secretary found and determined the economic method for calculating what the statute requires — "costs actually incurred." Then the respondents urge, albeit obliquely, (Resp. 6, fn. 3) that the Secretary need not make such findings. These arguments are, respectively, factually false and legally wrong.

3. *Economics.* The respondents argue (Resp. 6) that petitioner received "inflated" reimbursements. The argument fails on any economic analysis.

4. *Jurisdiction.* The government here contends (Resp. 8-9) that there has been no jurisdiction in this case, but this Court need not say so, respondents add. In *U. S.* v. *Whitecliff, Inc.*, cert. pending (No. 76-1188), however, this month, the government urges the Court to assume jurisdiction to block retroactive Medicare adjustment review.

FINDINGS

Respondents imply (Resp. 3-4, 5-6) that the Secretary made findings. If he did, they certainly have not been articulated anywhere. Respondents argue (Resp. 6, fn. 3) that the regulation in question, however, did not need findings to undergird the regulation. It must be tested, at law, by the enabling legislation, which requires two measurements for reimbursement regula-

tions: (1) any method of computing a reimbursable item must approximate the "cost actually incurred" in providing that item for Medicare purposes (42 U.S.C. § 1395x(v)(1)(A), Pet. App. A22), and (2) reimbursements from Medicare sources cover only the actual costs of providing Medicare services (42 U.S.C. § 1395x(v)(1)(A)(i), Pet. App. A22).

Here, presumptions will not suffice. Congress required that findings and determinations be made to support regulations on "cost actually incurred." Congress specifically included a limitation that a retroactive corrective regulation is authorized *only* if, for any fiscal period, a method of computing costs *proves (viz,* is proven) to yield excessive (that is, higher than actual cost) reimbursements (Pet. App. A23). Congress would not have required a useless act; if a presumption that the specific prerequisite findings have been made can be bootstrapped *ipso facto* from the adoption of the recapture regulation, Congress' requirement of findings-proof is a nullity.

ECONOMICS

Respondents urge (Resp. 6, fn. 2) that the challenged regulation is carefully tailored to affect only those providers whose accelerated depreciation reimbursements were "excessive." Not so. Contrary to respondent's' implication (Resp. 3), the regulation is applied to label as receivers of "excessive" reimbursements only those providers who used accelerated depreciation and terminated after August 1, 1970 —

not providers who took those exact same depreciation charges and terminated before August 1, 1970. Those pre-August terminators received aggregate depreciation reimbursements more in excess of the cumulative straight-line depreciation totals than did post-August terminators such as petitioner. Yet respondents would have this Court believe that only post-August terminators received "excessive" reimbursements. If the vice behind "excessive" Medicare payments is that those surplus amounts are used to subsidize non-Medicare expenses in violation of the statutory guideline,[1] then the pre-August terminators are the most serious violators of the Congressional mandate. Yet the Secretary by implication has not deemed these providers to have received excessive reimbursements. Respondents' arguments defy logic, common sense and close analysis.

A retroactive adjustment regulation is textually authorized where a reimbursement regulation has created excessive total reimbursements for a particular period. It is elementary that an excessive "total reimbursement" cannot have occurred unless the initial reimbursement regulation failed to approximate the actual economic cost of providing Medicare services. Nowhere is there a finding that accelerated depreciation does not approximate actual economic cost of fixed asset utilization, or that straight-line does. The patent justification behind the challenged regulation is fiscal rather than economic: regardless of whether

[1] And that *is* the statutory mandate, see Pet. App. A22.

accelerated depreciation approximates actual asset cost, straight-line reimbursements involve lesser expenditures, in a shorter period of time than the useful life of the asset. But of what value is that economic fact? Congress chose a standard of approximating "actual cost" rather than a standard yielding the least economic reimbursement. The Secretary did not follow this standard.

Whether the previously-validated accelerated depreciation method yielded amounts higher than actual economic asset depletion — whether over one fiscal program period or over the entire useful life of the asset, is an economic question to which some answer could be found. That accelerated depreciation is not straight-line depreciation is no answer. Nor is a focus on temporary termination of participation in the Medicare program any economic answer, although such a focus could be a punitive "answer," born of revenue needs.[2]

JURISDICTION

Respondents' soothing suggestion (Resp. 8, fn. 7) that *United States* v. *Whitecliff, Inc.* raises issues identical to the present petition supports rather than discourages acceptance of the present petition. In that case (536 F.2d 347, Ct. Cl. 1976) the government

[2] Respondents lightly pass off (Resp. 8) the prospect that petitioner could have withdrawn from the program before the effective date of the retroactive regulation. The Secretary held the withdrawal rights, not the petitioner. See 20 C.F.R. § 405.613 (1970).

argued that it never should take retroactive action, even if a provider had been inadequately reimbursed for "cost actually incurred." Moreover, respondents there argued that no court should review such determination of the Secretary. In urging this Court now to accept certiorari in *Whitecliff* (No. 76-1188, cert. pending) the government argues that there is a jurisdictional issue worthy of this Court's attention.

In our case, however, the respondents urge that no jurisdictional issue is of similar worth — although it is the same issue. The respondents' reliance on *Califano* v. *Sanders* (Resp. 9) is misplaced. Rather than precluding Administrative Procedure Act jurisdiction for claims of the type presented by this petitioner, *Califano* recognizes that the Constitutional (and, by the same logic, the statutory) challenges raised by petitioner are the precise type of issues for which APA jurisdiction does lie. Supreme Court Docket No. 75-1443, 45 U.S. L. W. 4209, 4211 (Decided 2/23/77). Moreover, there are adequate other jurisdictional grounds here. See *Rhodes* v. *Weinberger*, 388 F.S. 437 (D.C. Pa. 1975) (28 U.S.C. § 1361 provides jurisdiction to compel the Secretary to cease enforcing an unconstitutional provision); *St. Louis University* v. *Blue Cross Hospital Service*, 537 F.2d 283, 292 (8 Cir. 1976) (28 U.S.C. § 1331 provides jurisdiction to review a provider's claim of denial of constitutional rights).

CONCLUSION

The issues raised in the instant petition for certiorari are of widespread and growing concern within all levels of lower federal courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

TOOZE KERR PETERSON MARSHALL
& SHENKER
ARDEN E. SHENKER
MICHAEL J. GENTRY
Counsel for Petitioner